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In The

Supreme Court of the United States

October Term, 1996

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, individually and as Class Representatives on behalf of all persons similarly situated,

Petitioners,

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alaska Supreme Court erred by reviewing Alaska's commercial fishing license and permit fee differentials, which are predicated on residency, under the Privileges and Immunities Clause instead of under the Commerce Clause.

2. When a state imposes fees for a state-provided service, whether the compensatory tax doctrine prohibits the state from attributing to its residents taxes which they pay for that service.

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STATEMENT OF FACTS AND PROCEEDINGS BELOW

Alaska charges nonresident commercial fishers three times more for annual fishing licenses and annual limited entry permits than it charges resident commercial fishers.[1] These fees are intended to compensate the state for a portion of what it spends to manage its commercial fisheries.[2] Generally, the fees are a small fraction of the income derived from those fisheries.[3] In recent years,

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[1] For a commercial fishing license, a resident pays $30 per year and a nonresident pays $90 – a license fee differential of $60. Alaska Statute 16.05.480. App. 1a. For the annual fee for a limited entry permit, which varies according to the value of the particular fishery, a nonresident pays from $100 to $500 more each year than a resident. Alaska Statute 16.43.160; 20 Alaska Administrative Code § 05.240. App. 1a-6a.

[2] There is no evidence that the fee differentials are intended to discourage, or that they actually discourage nonresidents from participating in Alaska commercial fisheries. Petitioners are incorrect in saying "Alaska has essentially admitted that the overall purpose of the permit system is to keep non-residents out of Alaska's fisheries." Petition at 5. To support that claim, they quote a passage from report on the state's limited entry program, a program that limits the number of persons who can participate in Alaska's high value fisheries. Despite the implication of the passage, participation in those fisheries, although limited in number, does not favor residents over nonresidents. Anyone may participate after purchasing or being issued a limited entry permit.

Distinct from limited entry permits are the fees that permit holders must pay each year to the state. Those annual fees, three times higher for nonresidents than residents, are what petitioners are challenging. Thus, they have quoted language from a report that has no bearing on the annual fees.

[3] For example, a high value fishery having a $60 license differential and a $500 permit differential had average gross

nonresident participation in Alaska commercial fisheries has been increasing. App. 10a n.5.

In 1984, the petitioners filed a class action challenging Alaska's fee differentials. App. 8a. Among other allegations, the petitioners claimed that the differentials violate two clauses of the United States Constitution – the Privileges and Immunities Clause[4] and the Commerce Clause.[5] App. 9a. When the trial court ruled in the state's favor, the petitioners appealed to the Alaska Supreme Court. App. 12a-13a.

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earnings per permit that ranged, for the years 1983 through 1993, between $88,709 and $268,525. For the same years, a low value fishery having a $60 license differential and a $100 permit differential had average gross earnings per permit between $847 and $1613. App. 9a n.4. If license and permit fees are considered "user fees" for participating in Alaska's commercial fisheries, then the annual return on nonresidents' fees ranged between 956% and 3073% for the high value fishery and between 253% and 572% for the low value fishery. Of course, there are other fixed annual costs of commercial fishing – debt retirement on permits and vessels, gear costs, and crew shares, to name a few. The point of isolating this one cost is to show that the user fee is insignificant when compared to the benefit derived from participating in the fisheries.

[4] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.

[5] "The Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994). Petitioners are seeking review under this aspect of the Clause.

In 1990, the supreme court made its first ruling on the differentials. *Carlson v. State*, 798 P.2d 1269 (Alaska 1990). In *Carlson I*, the court held that the proper inquiry under the Privileges and Immunities Clause was whether all the fees and taxes paid to the state by nonresident fishers to participate in Alaska commercial fisheries are substantially equal to those paid by resident commercial fishers. App. 11a. The court said that the inquiry should take into account the residents' proportionate shares of state revenues to which nonresidents make no contribution and that are expanded for commercial fisheries management. *Id.* It also said that state revenues derived from petroleum production are analytically equivalent to taxes which only residents pay. *Id.* The court remanded the case for an accounting of those revenues and for several other inquiries. *Id.* It left open the question of whether this case is governed by the Commerce Clause. *Id.* at 1276-77 n.4. App. 13a n.8.

On remand, the trial court decided that the differentials do not violate the Commerce Clause or the Privileges and Immunities Clause. Again, the petitioners appealed. App. 13a.

In its second review of the fee differentials, *Carlson II*, the Alaska Supreme Court decided that the Commerce Clause was not implicated. *Carlson v. State*, 919 P.2d 1337, 1340-41 (Alaska 1996). This is because the differentials are not predicated on the movement of articles across state lines, but rather, on the residency status of persons applying for the permits and licenses. App. 15a-16a.

Under the Privileges and Immunities Clause, the Alaska Supreme Court decided that the trial court had

applied the incorrect formula for calculating the permissible differentials.[6] It remand the case for application of a different formula. App. 24a.

Under that formula, the permissible difference between a resident's fee and a nonresident's fee is each resident's proportionate share of the state's expenditures for commercial fishery management that are derived from petroleum revenues (in lieu of resident-only taxes).[7] App. 21a. In other words, a permissible nonresident's fee would be equal to the resident's fee *plus* the resident's proportionate share of petroleum revenues which are expended by the state for the management of commercial fisheries.[8]

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[6] The trial court found that in order to calculate the permissible fees, the petroleum revenues that are deposited in the state's general fund and paid out for commercial fisheries management should be divided by the number of resident permits issued in a given year. The supreme court held that the proper divisor is the total number of Alaskans. App. 22a.

[7] Under *Toomer v. Witsell*, 334 U.S. 385 (1948), a state may establish a resident-nonresident fee differential "which would merely compensate the State . . . for any *conservation* expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399. (Emphasis added.) Alaska's expenditures that support the commercial fishing industry are greater than just funds spent for "conservation." The state also spends funds for allocating fish among various commercial fisheries, for public works that support the industry, and for commercial fisheries law enforcement. In this brief, all of the state's commercial fishery activities are called "management."

[8] The supreme court expressed it this way: "Resident commercial fishers are paying the license and permit fees they are charged plus their *per capita* share of oil revenues which are diverted to fisheries management from other benefits or State

The petitioners are seeking review of those decisions.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S TREATMENT OF DIFFERENTIALS THAT ARE PREDICATED ON RESIDENCY, NOT ON THE MOVEMENT OF ARTICLES ACROSS STATE LINES.

The Alaska Supreme Court's reason for reviewing the fee differentials under the Privileges and Immunities Clause instead of under the Commerce Clause is that this Court " . . . [H]as consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses." App. 16a. To support that observation, the Alaska Court cited *Toomer v. Witsell*, 334 U.S. 385 (1948), and four other opinions by this Court. App. 16a n.10.

Petitioners claim that none of those opinions "suggests that discrimination against commercial interests based on residency is not cognizable under the Commerce Clause." Petition, at 13 n.16. While it is true that none of the opinions explicitly hold that, it is also true that this Court reviewed those cases, and has reviewed all other cases where differential treatment is predicated on

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services. It is this quantity which must be equivalent to the fee differential for the fees to be constitutional under the *Carlson I* analysis." App. 23a.

residency, *only* under the Privileges and Immunities Clause.[9]

Petitioners also claim that other opinions hold that differential treatment, predicated on residency, should be reviewed under the Commerce Clause. They have quoted passages which, when removed from their factual contexts, seem to support their proposition.[10] Petition at 14-16.

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[9] *Mullaney v. Anderson*, 342 U.S. 415 (1952), is no exception. Even though the lower court struck down the nonresident fee differential under the Commerce Clause, this Court, following *Toomer*, sustained that result under the Privileges and Immunities Clause, and only under that clause. *Id.* at 430.

[10] For example, petitioners say, "The Commerce Clause is implicated whenever a state seeks 'to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce.' " Petition at 15. Their partial quote is from *Hicklin v. Orbeck*, 437 U.S. 517, 533 (1978), an opinion where the Court struck down the "Alaska Hire" law.

Because the "Alaska Hire" law was predicated on residency, the Court applied the Privileges and Immunities Clause. *Id.* at 525-31. The Court went on to discuss the "mutually reinforcing relationship" between that clause and the Commerce Clause, and it stated that several Commerce Clause decisions gave support to its Privileges and Immunities Clause decision. *Id.* at 531-34.

Omitted from the petitioners' partial quote are the Commerce Clause opinions, identified at the beginning of the sentence in the *Hicklin* opinion. Those opinions – identified as "West, Pennsylvania v. West Virginia and Foster Packing," *id.* at 533, – struck down state action that was predicated on the movement of articles across state lines, not on a person's residency. (*West v. Kansas Natural Gas*, 221 U.S. 229 (1911) (Oklahoma law completely prohibited the export of natural gas found within the state.); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); (West Virginia law prohibited the export of natural gas before in-state demands were met.); *Foster Packing Co. v.*

But when the contexts are considered, all of those cases have a common feature that is absent from this one. All of them involve differential treatment that is predicated on the movement of articles across state lines. None of them have the pertinent feature of this case. None involve differential treatment that is predicated on a person's residency.[11]

Haydel, 278 U.S. 1 (1928) (Louisiana law required local processing before shrimp harvested in Louisiana could be exported.) Thus, the opinions contradict rather than support the petitioners' proposition.

[11] The Commerce Clause opinions cited by the petitioners are: *Brown v. Maryland*, 25 U.S. (12 Wheat) 419 (1827) (Maryland's tax predicated on a person importing merchandise from another state.); *Walling v. Michigan*, 116 U.S. 446 (1884) (Michigan's tax predicated on importing liquor from another state.); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (North Carolina's prohibition predicated on importing or selling apples bearing another state's grading label.); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) (West Virginia's gross receipts tax predicated on whether a taxpayer conducted manufacturing in West Virginia.); *New Energy Co. v. Limbach*, 486 U.S. 269 (1980) (Ohio's tax credit predicated on whether ethanol was produced in Ohio or produced in a state giving similar advantage to Ohio ethanol.); *Philadelphia v. N.J.*, 437 U.S. 617 (1978) (New Jersey's prohibition predicated on whether waste originated outside of New Jersey.); *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64 (1963) (Louisiana's use and sales taxes were predicated on whether the performance of certain services or the purchase of certain items occurred within Louisiana.); *Freeman v. Hewit*, 329 U.S. 249 (1946) (Indiana gross income tax predicated on the interstate sale of securities.); *Oregon Waste Systems v. Department of Envtl. Quality*, 511 U.S. 93 (1994) (Oregon's surcharge predicated on whether the solid waste was generated outside of Oregon.) In none of these Commerce Clause cases was a person's residency the predicating factor for differential treatment.

The petitioners claim that the Alaska Supreme Court's second reason for not reviewing the differentials under the Commerce Clause is because the court decided that "articles" had not yet entered the stream of commerce. Although the petitioners do not identify the "articles" here that trigger Commerce Clause analysis,[12] they discuss several opinions holding that the Clause applies to taxation on "local activities," that is, on articles that are destined to enter the stream of commerce even before they are harvested. Petition at 16-19.

The petitioners, however, have mischaracterized the supreme court's reason. The court reasoned that the fee differentials are predicated on residency, not on the movement of articles across state lines. App. 15a-16a. The court said nothing about *when* an article, which eventually enters the stream of commerce, qualifies for analysis

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[12] The fish caught by commercial fishers cannot be the "articles" that qualify for analysis under the Commerce Clause; Alaska's fee differentials do not treat fish differently because they are shipped in interstate commerce. The same is true of the fishers themselves.

For this case to resemble other cases analyzed under the Commerce Clause, Alaska's differentials would have to be predicated on something crossing Alaska's borders. (A state discriminates against interstate commerce if it "tax[es] a transaction or incident more heavily *when it crosses state lines* than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), (emphasis added.) If Alaska were to impose a head tax or some other burden on all incoming fishers, including residents, that is predicated on their travel from a point outside of the state, this case would warrant review under the Commerce Clause. However, the fee differentials do not target interstate commerce in that manner.

under the Clause.[13] The petitioners' arguments about "local activities" are misdirected.

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S HOLDING UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE THAT A STATE, WHEN IMPOSING FEES FOR A STATE-PROVIDED SERVICE, MAY ATTRIBUTE TO ITS RESIDENTS TAXES THEY PAY FOR THAT SERVICE. RECENT DECISIONS UNDER THE COMPENSATORY TAX DOCTRINE DO NOT DIMINISH THAT HOLDING

The Alaska Supreme Court remanded this case to apply a formula under the Privileges and Immunities Clause for analyzing the fee differentials. That formula will credit resident commercial fishers with their proportionate share of state expenditures for commercial fishery management that are derived from taxes which only residents pay. Thus, the formula follows *Toomer*'s holding that a state may "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." *Toomer* at 398, 399. For simplicity, this will be called the "tax attribution doctrine."

Both *Toomer* and the Alaska Supreme Court recognize that when the state assesses fees for a service, attributing

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[13] The Alaska Supreme Court, in its first decision in this case, acknowledged that later opinions by this Court conflict with the proposition that unharvested fish do not implicate the Commerce Clause. *Carlson I*, 798 P.2d 1269, 1276 f.4 (Alaska 1990). It would be incongruous for the Alaska Supreme Court, in its second decision, to rely on that proposition.

to residents their proportionate share of state taxes they have paid for that service is necessary for treating residents and nonresidents "on terms of substantial equality."[14] Were residents and nonresidents charged identical fees, the residents, when their proportionate tax payments for the same services are taken into account, would be paying *more* than nonresidents for those services. In essence, the residents would be overcharged by the amount that their taxes pay for that service.

Despite this reality, the petitioners claim that the Alaska Supreme Court erred in applying tax attribution doctrine. They imply that *Toomer* has been overruled. Petition at 11, 21. They argue that the Court's recent treatment of the compensatory tax doctrine under the Commerce Clause prevents Alaska from attributing resident taxes under the Privileges and Immunities Clause. Petition at 21-23.

The petitioners are incorrect when saying that the tax attribution doctrine is "antiquated" and "long since discredited." Petition at 12. *Toomer* made rulings on both the Privileges and Immunities Clause and the Commerce Clause. Under the Privileges and Immunities Clause, it struck down South Carolina's 100:1 nonresident fee differential and, in doing so, established the tax attribution doctrine: a state may "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 398, 399. That holding is what the Alaska Supreme Court followed, and it has

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[14] *Toomer*, 334 U.S. at 396.

never been rejected, either explicitly or implicitly, by this Court.[15]

The petitioners are correct when, probably referring to nonresident fee differentials, they say "no decision of this Court has ever upheld such discrimination, or discrimination based on a theory of foregone revenues. . . ." Petition at 21. But that is true only because this Court has not taken up those differentials since *Mullaney*. A more relevant statement would be that no decision of this Court *has ever rejected* the tax attribution doctrine since it was announced in *Toomer*. It is still "good law," and well it should be. Without the doctrine, there could be no "substantial equality" between residents and nonresidents when their fees pay for only a portion of a state-provided service and the residents' taxes pay for the rest.

Petitioners argue that decisions about the compensatory tax doctrine under the Commerce Clause should be

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[15] Perhaps petitioners, when they say "antiquated" and "discredited," are referring the *Commerce Clause* rulings of *Toomer*. Under that Clause, the Court reviewed the 1/8 cent per pound tax that South Carolina assessed on green shrimp taken in the maritime zone, *Toomer*, 334 U.S. at 394, and it reviewed the requirement that shrimpers unload, pack, and stamp their catch at a South Carolina port before shipping it to another state, *id.* at 403. The Court said that the South Carolina tax did not violate the Commerce Clause because "the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." *Id.* at 394, 395. Later opinions suggest that the Clause may be implicated before fish, destined for interstate commerce, are harvested. See Petition at 16-19. Even so, *dicta* under the Commerce Clause does not affect *Toomer's* holding under the Privileges and Immunities Clause creating the tax attribution doctrine.

the basis for overruling the tax attribution doctrine under the Privileges and Immunities Clause. Essentially, they argue that the two doctrines are interchangeable, and they imply that this Court, in recent decisions, has rejected the compensatory tax doctrine. Petition at 21-23.

Although the Commerce Clause and the Privileges and Immunities Clause share a common origin and have similar analyses,[16] the clauses address entirely different types of discrimination: discrimination against articles traveling across state lines versus discrimination against nonresidents pursuing a livelihood or other important interest.

Likewise, the two doctrines involve different inquiries. Under the compensatory tax doctrine, a state, to justify a tax on interstate commerce, must identify an offsetting *tax imposed on intrastate commerce*. Under the tax attribution doctrine, a state, to justify higher fees against nonresidents, must identify offsetting *fees paid by residents through the taxes they pay for that state-provided service*. The inquiries are not interchangeable.

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[16] Both Clauses have their origin in the Fourth Article of the Articles of Confederation. *Hicklin*, 437 U.S. at 531-32. Under the Commerce Clause, a state may discriminate against interstate commerce if there is a legitimate state interest that cannot be achieved by other, nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Under the Privileges and Immunities Clause, a state may discriminate against nonresidents if there is a valid reason, independent of the mere fact that they are nonresidents, and if the degree of discrimination bears a close relation to the reason. *Toomer*, 334 U.S. at 396. Thus, under both analyses, discrimination is prohibited unless the state has a legitimate purpose or reason and if it satisfies other conditions.

In recent years, states have had difficulty when trying to rely on the compensatory tax doctrine. Principally, they have been unable to satisfy the third prong of the doctrine which requires that the interstate tax and the compensatory intrastate tax be assessed against "substantially equivalent events."[17] But because states have failed to meet this prong does not mean that the Court has rejected the doctrine, or as petitioners imply, rejected its rationale. Although the Court has not recently employed

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[17] To rely on the compensatory tax doctrine, a state must show three things: (1) the intrastate tax for which the state is intended to compensate; (2) that the interstate tax must roughly approximate – but not exceed – the intrastate tax; and (3) that the events on which the intrastate and interstate taxes are imposed are "substantially equivalent," that is, are sufficiently similar in substance to serve as mutually exclusive proxies of each other. *Oregon Waste Systems*, 114 S.Ct. at 1352, 128 L.Ed.2d at 24.

Recently, states have had difficulty satisfying the third prong. For example, see *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Severance and first use or processing were not "substantially equivalent events" on which compensating taxes might be imposed. *Id.* at 759.); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) ("Here, too, manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." *Id.* at 463.); *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) ("We conclude that, far from being substantially equivalent, taxes on earning income and utilizing Oregon landfills are 'entirely different kind[s] of tax[es].' " *Id.*, 114 S.Ct. at 1353, 128 L.Ed.2d at 25. *Fulton Corp. v. Faulkner*, 116 S.Ct. 848 (1996) ("Even assuming the truth of both these assertions, however, we find that the intangibles tax is not functionally equivalent to the corporate income tax." *Id.* at 858.).

the doctrine outside of the context of sales and use taxes (*see Oregon Waste Systems*, 114 S.Ct. at 1353, 128 L.Ed.2d at 25), the doctrine is still viable.

To be sure, the Court has discussed the practical difficulty of identifying compensatory intrastate taxes "in various other means of general taxation, such as income taxes. . . . " *Id.* Such an inquiry may show that some residents who pay the state's general taxes are also paying the interstate taxes. For them, the taxes are cumulative, not compensatory. *See id.*

The difficulty of fitting general state taxes into the compensatory tax doctrine, however, does not mean that they should be stricken from the tax attribution doctrine. Indeed, the latter is grounded on the principle that the residents' payments for the state-provided service *through their general taxes* is the permissible ground for charging the residents a lower fee. If residents' general taxes cannot be considered, the attributing tax doctrine dissolves.

There are other reasons for not transferring the compensatory tax doctrine, or its difficulties, to the attributing tax doctrine. As pointed out earlier, their inquiries are incongruous. It is futile to search for a compensatory interstate tax when the differential treatment is predicated on residency, not on articles moving across state borders.

With residency as the predicating factor, courts do not have to "plunge . . . into the morass of weighing comparative tax burdens by comparing taxes on dissimilar events." *Id.* There are no "events" to analyze. Unlike the income tax at issue in *Oregon Waste Systems*, which

was borne partially by interstate commerce, here the nonresidents pay nothing beyond their fees toward the state's costs of fisheries management.

The Alaska Supreme Court's Privileges and Immunities Clause analysis is straight forward. First, the state must identify its "conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399. Because Alaska residents pay no general income tax and most of the state's expenditures come from petroleum revenues, those revenues are "analytically equivalent to 'taxes which only residents pay'." App. 11a. Then, the state will have to divide the petroleum revenues that pay for its commercial fisheries management by the number of Alaska residents. The resulting quotient can be attributed to each Alaska commercial fisher. It is the difference that the state can charge between that fisher's fee and a nonresident fisher's fee for the same license or permit. There is no "morass" of taxable "events" that complicate the analysis.

A permit or license is needed to participate in Alaska's commercial fishing industry. Alaska provides management services to that industry. A permissible fee differential is based on Alaska's expenditures for that industry. Thus, Alaska's fees resemble "user fees."[18]

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[18] Under the Commerce Clause, the Court distinguishes "user fees" from "compensatory taxes." A "user fee" is a "specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981). *See also Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S.

That is another reason to not employ the compensatory tax doctrine. User fees and taxes are not subject to the same analysis as are compensatory taxes.[19] Thus, even if Alaska's fees were reviewable under the Commerce Clause, the compensatory tax doctrine would probably not be part of that review.

CONCLUSION

This Court has applied the Privileges and Immunities Clause to differentials that involve "basic and essential activities,"[20] and are predicated on residency. This Court has never applied the Commerce Clause unless differentials are predicated on the movement of articles across state lines. The Alaska Supreme Court's use of the Privileges and Immunities Clause instead of the Commerce

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583 (1939). It follows that a "compensatory tax" occurs when the transportation, facility, or service is provided by private entities. See *Oregon Waste Systems*, 114 S.Ct. at 1352 n.6.

[19] Regarding user fees and taxes, the Court said "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Commonwealth Edison*, 453 U.S. at 622 n.12, quoting *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 190 (1931). "Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered. . . . ' ". *Commonwealth Edison*, 453 U.S. at 622 n.12, quoting *Clark*, 306 U.S. at 599. *See also, Evansville*, 405 U.S. at 716-17.

[20] *Baldwin v. Montana*, 436 U.S. 371, 387 (1978).

Clause when reviewing the resident-nonresident fee differentials is consistent with that precedent.

The tax attribution doctrine, established by *Toomer* under the Privileges and Immunities Clause, is still "good law." Although the Court has not applied the doctrine in recent years, the petitioners can cite to no opinion where it has been rejected.

The tax attribution doctrine is vital for "substantial equality" between residents and nonresidents when they are charged user fees for a state-provided service and the state supplements those fees with tax revenues paid by the residents. If the state could not attribute to a resident his or her proportionate share of those taxes, each resident would be paying that amount more than a nonresident for the same service. States would be disinclined to spend resident-only taxes for a service that benefits nonresidents. They would be inclined to either stop providing the service or to equalize the fees, but raise them high enough to cover the full cost of the service.

Under the tax attribution doctrine, the inquiry looks not to whether there is an intrastate tax to "compensate," but whether resident-paid tax revenues that support state-provided services are substantially equivalent to the additional amount that nonresidents pay through a higher use fee. "Compensatory tax" analysis has no place in that inquiry.

Because the Alaska Supreme Court has followed this Court's rulings under the Privileges and Immunities Clause and under the Commerce Clause, the petition for writ of certiorari should be denied.

Respectfully submitted this 12th day of December 1996.

BRUCE M. BOTELHO
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APPENDIX

Sec. 16.05.480. Commercial fishing license. (a) A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $30 for residents, and $90 for nonresidents. Except for those which are also entry or interim-use permits, all commercial fishing licenses are nontransferable. The commercial fishing license shall be retained in the possession of the licensee, readily accessible for inspection at all times. No more than one fee may be charged annually against a person. For the purposes of this section, "commercial fishing license" includes entry permits and interim-use permits issued under AS 16.43 and crewmember fishing licenses.

(b) A person applying for a resident commercial license under this section shall provide the proof of residence that the department requires by regulation.

(c) *[Repealed, § 12 ch 123 SLA 1978.]* (§ 6 art III ch 94 SLA 1959; am § 19 ch 131 SLA 1960; am § 1 ch 93 SLA 1966; am § 2 ch 42 SLA 1968; am § 8 ch 105 SLA 1977; am §§ 1, 2, 12 ch 123 SLA 1978; am § 1 ch 79 SLA 1982)

Sec. 16.43.160. Fees. (a) The commission shall establish annual fees for the issuance and annual renewal of entry permits or interim-use permits. The amount paid by a permit holder under the provisions of AS 16.05.480 shall be credited by the commission toward payment of the fee charged under this section. No more than one credit may be obtained annually by a person.

(b) Annual fees established under this section shall be no less than $10 and no more than $750 and shall reasonably reflect the different rates of economic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

(c) The resident holder of an entry permit or interim-use permit who has a family income falling within the federal poverty guidelines, adjusted by the commission to reflect appropriate cost-of-living differentials, is subject to a maximum annual fee of $15.

(d) The commission may charge interest at a rate not to exceed the legal rate of interest established in AS 45.45.010 on fees more than 60 days overdue. (§ 1 ch 79 SLA 1973; am § 15 ch 105 SLA 1977; am § 4 ch 123 SLA 1978; am § 2 ch 79 SLA 1982; am §§ 3, 4 ch 22 SLA 1985)

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20 AAC 05.240. SCHEDULE OF ANNUAL FEES. (a) The annual fee for the issuance or renewal of an entry permit or interim-use permit is determined by the commission on a yearly basis according to the following:

(1) the resident annual fee for the issuance or renewal of an entry permit or interim-use permit in a limited fishery is .25 percent of the estimated value of the entry permit, rounded to the nearest fee class amount established in (4) of this subsection; the nonresident annual fee is three times this amount, as set out in (4) of this subsection; if insufficient data are available to determine the estimated value of an

entry permit, the annual fee in a limited fishery will be calculated according to (2) or (3) of the subsection;

(2) the resident annual fee for the issuance or renewal of an interim-use permit in an unlimited fishery is .25 percent of the estimated average gross earnings per permit in the most recent three years for which data are available, rounded to the nearest fee class amount established in (4) of this subsection; the non-resident fee is three times this amount, as set out in (4) of this subsection;

(3) notwithstanding (2) of this subsection, the commission will, in its discretion, make an appropriate adjustment to a fee if more than one permit type allows the directed harvest of the same species with the same gear in the same area or if one permit allows the directed harvest of the same species by a combination of gears in the same area; if strict application of (1) and (2) of this subsection results in a fee that exceeds the level appropriate in light of the rate of economic return for the fisheries covered by that permit, the commission will, in its discretion, reduce the fee;

(4) the resident and non-resident annual fees are:

FEE CLASS	ANNUAL FEE	
	Resident	**Non-resident**
I	$250	$750
II	200	600
III	150	450
IV	100	300
V	50	150

(5) under (1) of this subsection, the entry permit value for each fishery will be estimated by the

commission in the spring of the year immediately preceding the year for which the annual fee applies;

(6) under (2) and (3) of this subsection, the average gross earnings for each fishery will be estimated by the commission in the spring of the year immediately preceding the year for which the annual fee applies; these estimates will be based upon the most recent three years for which data are available; if less than three years of data are available for a fishery, the average will be calculated using the available years.

(b) Unless fishery resources, gear, or administrative areas are combined under this chapter, and except as provided in 20 AAC 05.120, a separate permit is required for each separate fishery resource, gear, and administrative area.

(c) For the purpose of assessing the fees for the application for, or renewal of, entry and interim-use permits, a "resident" is

(1) repealed 11/26/87;

(2) one who, on the date of permit application or renewal, and throughout the 12-month period before that date

(A) except for brief intervals, military service, attendance at an educational or training institution, or absence for good cause is, and was, physically present in the state with the intent to remain in the state indefinitely and to make a home in the state; and

(B) neither claimed nor received benefits as a resident of another state, territory or country.

(d) For the purposes of this chapter, criteria relevant to a determination of residence include, but are not limited to,

(1) where an individual is registered to vote;

(2) where an individual claims residence on his income tax returns;

(3) where an individual registers or licenses his personal property, including but not limited to cars, boats, trucks and trailers;

(4) by which state the individual is licensed to drive;

(5) in which state the individual maintains bank accounts, savings accounts, lines of credit, and other such financial relationships; and

(6) in which state the individual maintains a permanent place of abode.

(e) Alaska residents may apply for a reduced fee of $15 for the issuance of an interim-use permit or the annual renewal of an interim-use or entry permit if their total family income falls within the poverty guidelines for the Legal Services Corporation, as set out in Appendix A to 45 C.F.R. 1611, and as modified by Alaska regional cost-of-living differentials. A commission publication entitled *CFEC Map/Cost of Living Differentials* contains maps designating the regions and charts showing regional cost-of-living differentials, and is incorporated in this section by reference.

(f) A non-resident may apply for a reduced fee of $45 for the issuance of either an interim-use permit or the annual renewal of an interim-use or entry permit if the

non-resident's total family income falls within the poverty guidelines for the Legal Services Corporation, as set out in Appendix A to 45 C.F.R. 1611. (Eff. 12/27/79, Register 72; am 1/2/81, Register 77; am 3/4/81, Register 78; am 1/29/82, Register 81; am 10/30/82, Register 84; am 12/30/82, Register 84; am 10/28/84, Register 92; am 12/29/84, Register 92; am 4/13/85, Register 94; am 9/26/85, Register 95; am 11/22/87, Register 104; am 11/26/87, Register 104; am 1/17/91, Register 117; am 2/8/95, Register 133; am 5/4/95, Register 134)

Authority:

AS 01.10.055 AS 16.43.110 AS 16.43.160
AS 16.43.100 AS 16.43.140 AS 16.43.990

Donald H. CARLSON, Warren Hart, Gerard Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, Individually and as Class Representatives on behalf of All Persons Similarly Situated, Appellants,

v.

STATE of Alaska, COMMERCIAL FISHERIES ENTRY COMMISSION, Appellee.

No. S-6590.

Supreme Court of Alaska.

June 21, 1996.

Class action was brought challenging the constitutionality of state's practice of charging nonresident commercial fishermen three times as much as resident fishermen for commercial licenses and limited entry permits. The Superior Court, Third Judicial District, Anchorage, Karen L. Hunt, J., denied relief, and class appealed. The Supreme Court, 798 P.2d 1269, affirmed in part, reversed in part, and remanded. On remand, the Superior Court, Peter A. Michalski, J., concluded that fee differential did not violate either the commerce clause or the privileges and immunities clause, and class again appealed. The Supreme Court, Compton, J., held that: (1) commerce clause was not implicated in challenge to fee differential, as differential was not predicated upon the movement of articles of commerce across state lines, but rather upon residency status of those applying for permits; (2) disparate fees charged to nonresidents did not offend privileges and immunities clause if differential did not exceed contribution made by residents to fisheries

management, because differential would be justified as imposing on nonresidents their share of costs of commercial fisheries; and (3) proper method by which to calculate contribution made by residents was per capita formula proposed by class, rather than pro rata formula proposed by state.

Reversed and remanded.

Rabinowitz, J., filed dissenting opinion.

Loren Domke, Loren Domke, P.C., Juneau, for Appellants.

Stephen M. White, Marie Sansone, Assistant Attorneys General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

COMPTON, Justice.

I. *INTRODUCTION*

This is the second appeal from a class action challenging the State of Alaska's practice of charging nonresident commercial fishers licensing and limited entry permit fees which are three times greater than the fees charged resident commercial fishers. The class is comprised of "all persons who participated in one or more Alaska commercial fisheries at any time who paid nonresident assessments to the State for commercial or gear licenses or permits." *Carlson v. State*, 798 P.2d 1269, 1270

(Alaska 1990) (*Carlson I*). In this appeal the class challenges the superior court's grant of summary judgment to the State. The class contends that the superior court misinterpreted our mandate on remand and that the fee differential violates the Commerce Clause[1] and Privileges and Immunities Clause[2] of the United States Constitution. We reverse and remand.

II. *FACTS AND PROCEEDINGS*

This appeal, like *Carlson I*, contests the constitutionality of AS 16.05.480, AS 16.43.160 and Alaska Administrative Code (AAC) 20.05.240.[3] Under AS 16.05.480 a resident pays $30 per year for a commercial fishing license, while a nonresident pays $90 per year for the same license. Similarly, under 20 AAC 5.240(a)(1)-(4) nonresidents pay three times more for limited entry permits. The fee for limited entry permits is determined by the value of the permit;[4] the fee range,

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[1] The United States Constitution provides: "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several States and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

[2] The Privileges and Immunities Clause of United States Constitution provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. Const. art. IV, § 2.

[3] AS 16.43.160 is the authority under which the Commercial Fisheries Entry Commission (CFEC) adopted 20 AAC 5.240.

[4] The profitability of the different fisheries, and hence the value of permits, varies dramatically. For example, the average gross earnings per permit for the Chignik salmon seine fishery ranged from $88,709 to $265,525 for the years 1983 through 1993.

for residents, is from $50 to $250.[5] *See* 20 AAC 5.240(a)(1)-(4).

In *Carlson I* the class alleged: (1) violations of the Privileges and Immunities Clause and Commerce Clause; and (2) the absence of State statutory authority to charge this type of fee differential prior to January 1983. We rejected the class's second contention that the statute did not authorize the 3:1 differential prior to 1983. *Carlson I*, 798 P.2d at 1278-79. However, as to the first issue we remanded the case and imposed on the State the burden of persuasion in defending the Commerce Clause and Privileges and Immunities challenges. *Id.* at 1274-78. With regard to the Privileges and Immunities Clause question we held:

> Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are

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The permit fee for this fishery is $250 for residents and $750 for nonresidents. During the same time period the average gross earnings per permit for the Bristol Bay herring spawn on kelp fishery ranged from $847 to $1613. The permit fee for this fishery is $50 for residents and $150 for nonresidents.

[5] The State notes that there is no evidence that this fee differential has discouraged nonresidents from participating in Alaska's commercial fisheries. During the period between 1982 and 1992 the participation of nonresidents in Alaska fisheries continued to increase. The State also emphasizes that virtually every state that has a commercial fishing industry has higher nonresident licensing and permitting fees. In many of these states the differential between resident and nonresident fees exceeds the one contested here.

> *prima facie* a violation of it. . . . Thus the questions here are whether the state has a substantial reason for the discrimination, and whether the 3:1 fee ratio bears a sufficiently close relationship to the goal.

Carlson I, 798 P.2d at 1274 (citations omitted). In imposing the burden of persuasion on the State on this issue we adopted the Wisconsin Supreme Court's analysis. *See Taylor v. Conta*, 106 Wis.2d 321, 316 N.W.2d 814, 823 n. 17 (1982). In doing so we held that "the burden of persuasion to demonstrate justification is properly on the state."[6] *Carlson I*, 798 P.2d at 1276.

We framed the issue on remand as, "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." *Carlson I*, 798 P.2d at 1278. We also held that the revenues derived by the State from petroleum production are "analytically[ ] equivalent to 'taxes which only residents pay.' " *Carlson I*, 798 P.2d at 1278.

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[6] We similarly imposed the burden of proof on the Commerce Clause challenge on the State. We held:

> [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Carlson I, 798 P.2d at 1277 (quoting *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986)).

On remand the parties cross-moved for summary judgment, each proposing a different method by which to compare the fees being paid by nonresidents with the expenditures of state revenues to which the nonresidents make no contribution (the costs to residents). The class proposed what it termed the *per capita* formula. The *per capita* formula computes the contribution made by each resident to the cost of maintaining the commercial fisheries and compares this with the fee differential. The State proposed what it termed the *pro rata* formula. The *pro rata* formula in effect compares the total contributions made to the cost of commercial fisheries by residents to the total fees paid by nonresidents. The superior court concluded that under this method of analysis, residents paid by way of taxes (or their analytical equivalent) substantially more than nonresident fishers paid. In reaching this conclusion, the superior court applied the State's proposed formula to the categories of expenses accepted by us in *Carlson I*.[7] As the licensing and permitting fees charged nonresidents did not exceed the amount paid by

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[7] The State presented additional budget figures which included an analysis of every state agency for the years 1981 through 1993. The State claims that these figures included expenditures to which only Alaska residents contributed and which benefitted only commercial fishers. The class requested a stay and a reopening of discovery to address these new figures. The superior court determined that as it had not relied on the new figures in granting summary judgment, any dispute over these figures was moot. However, the court did reserve the right to reconsider this decision if this court determined that the class's *per capita* method should have been employed.

residents, the superior court concluded that the differential did not violate either the Commerce Clause or the Privileges and Immunities Clause. The class appeals.

III. *DISCUSSION*

A. *Standard of Review*

Both parties correctly argue that the Commerce Clause and the Privileges and Immunities Clause challenges to AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 present questions of constitutional law which we review *de novo*. *See Wright v. Black*, 856 P.2d 477, 479 (Alaska 1993). The issue of whether the superior court erred in adopting the *pro rata* formula to calculate the contribution to commercial fisheries management made by residents is also an issue of law which we review *de novo*. *Langdon v. Champion*, 745 P.2d 1371, 1372 n. 2 (Alaska 1987).

B. *The Challenged Fee Differential under the Commerce Clause*

The class contends that two recent Supreme Court decisions require that the different fees charged to residents and nonresidents under AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 be analyzed under the Commerce Clause.[8] *See Oregon Waste Systems v. Dep't of Envtl. Quality*, 511 U.S. 93, ___, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13

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[8] In *Carlson I* we left open the question of whether this case was governed by the Commerce Clause. We noted that earlier Supreme Court cases had suggested that the Commerce Clause does not apply to fish until the fish are actually harvested. *Carlson I*, 798 P.2d at 1276 n. 4 (citing *McCready v. Virginia*, 94 U.S. 391, 396, 24 L.Ed. 248 (1876); *Toomer v. Witsell*, 334 U.S. 385,

(1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992). The class argues that the fee differentials in these statutes and regulations violate the negative Commerce Clause.[9] The class argues AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 are *per se* invalid under the Commerce Clause. A substantial portion of the class's briefs is devoted to analogizing the different commercial licensing and permit fees

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394-395, 68 S.Ct. 1156, 1161, 92 L.Ed. 1460, *reh'g denied*, 335 U.S. 837, 69 S.Ct. 12, 93 L.Ed. 389 (1948)).

[9] The grant of regulatory power to Congress implicit in the Commerce Clause has been interpreted to have a "negative" aspect "that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, ___, 114 S.Ct. 1345, 1349, 128 L.Ed.2d 13 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992)). A negative Commerce Clause analysis has two steps. First, the court must determine whether the challenged statute discriminates against interstate commerce or "regulates evenhandedly with only 'incidental' effects on interstate commerce." *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1350 (citations omitted). Second, "[i]f the restriction is discriminatory – i.e., favors in-state economic interests over their out-of-state counterparts – it is virtually *per se* invalid." *Id.* at ___, 114 S.Ct. at 1347. A restriction found to be *per se* invalid must be struck down unless the state can "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at ___, 114 S.Ct. at 1351 (citations omitted). The justifications for a discriminatory tax or restriction must pass the strictest scrutiny. *Id.* at ___, 114 S.Ct. at 1351. However, if the restriction is nondiscriminatory it is valid unless the burden it imposes on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970)).

charged residents and nonresidents to surcharges the states of Oregon and Alabama imposed on out-of-state waste. The Supreme Court struck down these surcharges. *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1355; *Chemical Waste*, 504 U.S. at 334, 112 S.Ct. at 2009. The class contends that under the reasoning employed in *Oregon Waste Systems* and *Chemical Waste*, the 3:1 fee differential is tantamount to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1350.

Oregon Waste Systems does not require that the fee differential challenged herein be evaluated under the Commerce Clause. In both *Oregon Waste Systems* and *Chemical Waste*, the Court found taxes imposed on out-of-state waste which were greater than the taxes imposed on in-state waste violated the negative Commerce Clause. In applying the negative Commerce Clause analysis in *Oregon Waste Systems*, the Court emphasized that the Commerce Clause prohibits states from unjustifiably discriminating against or burdening the interstate flow of *articles of commerce*. *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1349. The Court went on to hold that "[i]t is well-established, however, that a law is discriminatory if it 'tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.' " *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1350 (quoting *Chemical Waste*, 504 U.S. at 342, 112 S.Ct. at 2013).

Unlike the fee differentials in *Oregon Waste Systems* and *Chemical Waste*, the fee differentials at issue in this case are not predicated upon the movement of articles of

commerce across state lines, but rather upon the residency status of those applying for permits. The Supreme Court has consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses.[10] In *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948), the Court evaluated South Carolina shrimping license fees, which were one hundred times greater for non-residents than for residents, under the Privileges and Immunities Clause. There the Court observed that the Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[11] *Toomer*, 334 U.S. at 395, 68 S.Ct. at 1162.

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[10] *See United Bldg. & Const. v. Mayor & Council of Camden*, 465 U.S. 208, 215-19, 104 S.Ct. 1020, 1026-28, 79 L.Ed.2d 249 (1984) (analyzing a municipal resident hiring preference under the Privileges and Immunities Clause); *Hicklin v. Orbeck*, 437 U.S. 518, 524, 98 S.Ct. 2482, 2486-87, 57 L.Ed.2d 397 (1978) (evaluating under the Privileges and Immunities Clause the Alaska Hire Law which preferenced Alaska residents in hiring); *Sosna v. Iowa*, 419 U.S. 393, 406, 95 S.Ct. 553, 560-61, 42 L.Ed.2d 532 (1975) (reviewing Iowa's durational residency requirement for divorces under the Privileges and Immunities Clause); *see also Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 383, 98 S.Ct. 1852, 1860, 56 L.Ed.2d 354 (1978) (stating that the Privileges and Immunities Clause "has been interpreted to prevent a State from imposing unreasonable burdens on Citizens of other States in their pursuit of common callings within the State" (citations omitted)).

[11] In *Anderson v. Mullaney*, 191 F.2d 123 (9th Cir.1951), *aff'd* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), the Ninth Circuit struck down on Commerce Clause grounds an Alaska territorial statute which charged non-resident fishermen a higher license fee than resident fishermen. On certiorari the Supreme Court

C. *The Challenged Fee Differential under the Privileges and Immunities Clause*

The class contends also that the nonresident fee differential violates the Privileges and Immunities Clause of the United States Constitution. The Privileges and Immunities Clause is not absolute. "[I]t does not preclude disparity of treatment [of citizens of other states] in the many situations where there are perfectly valid independent reasons for it." *Toomer*, 334 U.S. at 396, 68 S.Ct. at 1162. A claim that a residency classification violates the Privileges and Immunities Clause requires a two-step inquiry:

> First, the activity in question must be sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause. . . .
>
> Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest.

Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64-65, 108 S.Ct. 2260, 2264, 101 L.Ed.2d 56 (1988) (internal quotations and citations omitted).

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affirmed on Privileges and Immunities rather than Commerce Clause grounds, following *Toomer v. Witsell*. Assuming that the Commerce Clause would also apply to cases of this nature, it is difficult to believe that a license fee differential which passes muster under the Privileges and Immunities analysis would nonetheless be an unconstitutional discrimination against interstate commerce.

We determined in *Carlson I* that commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause. 798 P.2d at 1274. However, the class claims that for us to find for the State on the relatedness prong of the inquiry, the State "must demonstrate that behind the nonresident surcharge or differential is a[sic] (1) substantial reason advancing a legitimate State policy and (2) the means employed by the statutory scheme must be closely tailored and have a substantial relationship to a legitimate interest served by the statute." Appellant's Brief at 27.

We have already made the first inquiry. In *Carlson I*, we held that equalizing the burden of fisheries management, "where residents pay proportionately more in foregone benefits than nonresidents for fisheries management," was a substantial State interest. *Id.* at 1278. However, we concluded that the record did not contain sufficient evidence to determine whether the differential in fees charged residents and nonresidents was sufficiently related to this interest to justify such disparate treatment. *Id.* at 1278.

The class questions the relatedness of the fee differential to the burden of fisheries management borne by residents. It analogizes this case to other Supreme Court cases, and challenges our conclusion in *Carlson I* that petroleum revenues are the analytical equivalent of taxes. The class argues that *Oregon Waste Systems* prohibits the State from arguing that the fee differentials do not discriminate against nonresidents because they merely impose on nonresidents their share of the costs of fisheries management. It claims that under the reasoning of *Oregon Waste Systems*, neither general tax revenues nor oil

royalty revenues can be viewed as the residents' contributions to fisheries management.[12]

There are two flaws with the class's argument. First, *Oregon Waste Systems* was a Commerce Clause case. *See Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1349. Although the reasoning in Privileges and Immunities Clause cases has been used in Commerce Clause cases, it is not analytically sensible to do the reverse in this case. In this case the Privileges and Immunities Clause question turns on whether there is a sufficient relationship between the higher fees charged nonresidents and the State's interest in imposing on nonresidents their share of the costs for managing the State's commercial fisheries. In *Oregon Waste Systems*, the issue was whether the interstate and intrastate taxes are imposed on sufficiently equivalent events such that they could be considered proxies for each other. *See Id.* at ___-___, 114 S.Ct. at 1352-53. These are different inquires for which the analysis is not interchangeable.[13]

Second, the class's argument demonstrates a lack of understanding of our holding in *Carlson I*. Contrary to the

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[12] The class calls this its "attribution of tax revenues" argument.

[13] Additionally, the Supreme Court in *Oregon Waste Systems* had reasons other than the disparity between the events being taxed for finding that the Department of Environmental Quality's compensatory tax argument was disingenuous. For example, the Court expressed concern over the fact that the out-of-state surcharge was actually assessed on in-state shippers who already paid Oregon income taxes, the very tax the surcharge supposedly balanced out. *See Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1353.

class's contentions, we did not advocate the kind of fee-shifting denounced by the Supreme Court in *Oregon Waste Systems*. In *Carlson I* we did not advance a compensatory tax doctrine which would impose on nonresidents their entire share of the costs of commercial fisheries management, while resident fishers' share of these costs was borne by the entire population of the State. Rather, we held that the issue is

> whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.

Carlson I, 798 P.2d at 1278. The disparate fees charged to nonresidents will not offend the Privileges and Immunities Clause if the differential does not exceed the contribution made by residents, because the differential will be justified as imposing on nonresidents their share of the costs of commercial fisheries. The fee differential merely balances out "any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399, 68 S.Ct. at 1163.[14] In *Carlson I* we held that the State bore the burden of persuasion on this issue. 798 P.2d at 1276. This burden should be met by calculating the contribution made by residents and comparing it with the challenged fee differentials.

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[14] In *Oregon Waste Systems*, the Court gave no indication that it intended to cast doubt on this aspect of *Toomer*.

D. *The State's Pro Rata Method of Calculating the Amount Residents Contribute to Fisheries Management*

To establish "practical equality" between residents and nonresidents, the State must demonstrate that the higher fees charged nonresidents are equivalent to the burden borne by residents as measured by the "residents' *pro rata* shares of state revenues to which nonresidents make no contribution." *Carlson I*, 798 P.2d at 1278. The *per capita* formula propounded by the class is the correct method for calculating the contribution made by residents.

Under the *per capita* formula the resident contribution is calculated in the following manner: (Fisheries Budget/ Alaska Population) X (percentage of State Budget from oil revenues/1.0). *See Appendix A.* Once this computation is made the resident contribution can be compared to the difference in fees paid by nonresidents to determine if the fee differential is constitutional.

The State advocates a different formula for computing the resident contribution. The State's formula utilizes a three-step approach. The State would (1) calculate the expenditures or costs of the commercial fisheries (enforcement and conservation); (2) determine the resident and nonresident commercial fishers' respective *pro rata* shares of those expenditures; and (3) compare the percentage of its respective *pro rata* share each group is paying. *See Appendix A.*

The State's formula differs from the class's when it comes to deciding how to determine the numbers to be used in steps two and three. Although the formulae are

theoretically different and are calculating different quantities, the significant difference between the two proposed formulae concerns how the residents' *pro rata* share is calculated. As discussed above, the class argues that the amount used as the divisor of the commercial fisheries expenditures from taxes which only residents pay must be the total number of Alaskans. It correctly asserts that using this number will allow the court to determine the *per capita* contribution actually being made by each of the resident permit holders. On the other hand, the State argues that the holdings in *Toomer* and *Carlson I* mandate that the residents' contribution should be determined by dividing the fisheries' expenditures from taxes by the number of resident permits issued in any given year.[15] The State is wrong. As stated above, in *Carlson I* we held that the relevant inquiry was "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." *Carlson I*, 798 P.2d at 1278. Thus, we ordered the superior court to compare the relative burden placed on resident and nonresident commercial fishers. The *per capita* method does just this. Had *Carlson I* mandated a comparison of the expenditures made by the State to the

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[15] This is not exactly accurate because the State's formula never calculates the actual amount that each individual resident is purported to contribute. Rather, the State's formula calculates the percentages of their fair share of costs residents and nonresidents pay.

contribution made by nonresident fishers, the State's theory would be correct.[16] Resident commercial fishers are paying the license and permit fees they are charged plus their *per capita* share of oil revenues which are diverted to fisheries management from other benefits or State services. It is this quantity which must be equivalent to the fee differential for the fees to be constitutional under the *Carlson I* analysis. *See Carlson I*, 798 P.2d at 1278.[17]

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[16] However, this would be just the kind of compensatory tax rationale which the Supreme Court struck down in *Oregon Waste Systems*.

[17] The State also argues that the *per capita* formula should be rejected because it has never been used by any court in any context. The State cites a string of equal protection cases to support this assertion. *See Baldwin*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978); *LCM Enterprises, Inc. v. Town of Dartmouth*, 14 F.3d 675 (1st Cir.1994); *Johns v. Redeker*, 406 F.2d 878 (8th Cir.1969). However, these equal protection cases have no bearing on the suitability of the *per capita* approach in this case. In *Baldwin* the comparison being made was between the state's costs for maintenance of the big-game populations, not the contributions made by resident big-game hunters to the maintenance of big-game populations. *Baldwin*, 436 U.S. at 389, 98 S.Ct. at 1863. Additionally, in *Baldwin* the calculations were being viewed under the rational basis test, a more lenient standard than the intermediate scrutiny required in this case. *Baldwin*, 436 U.S. at 390-91, 98 S.Ct. at 1864. Similarly, *LCM Enterprises* is inapplicable because it too involved the application of the rational basis test, which only requires that the classification being challenged is rationally related to the legitimate state interest. *LCM Enterprises*, 14 F.3d at 679. *Johns* also has no relevance to the issue at hand because the court in *Johns* does not discuss the method the trial court used to determine the resident contribution which was being compared with the higher fees charged to nonresidents. *Johns*, 406 F.2d at 883.

As we have concluded that the resident contribution must be calculated using the class's *per capita* formula, we remand the case for the application of this formula. If under the formula the fee differential exceeds the resident contribution, the State will have failed to demonstrate that the means employed by its statute have a substantial enough relationship to the legitimate interest of the statute to survive Privileges and Immunities Clause review. Conversely, if the superior court finds that the fee differential is not greater than the resident contribution, the State has successfully carried its burden of proving that the means employed by its statutory scheme are substantially related to the legitimate interest served by the statute. On remand the superior court shall address issues relating to the additional budget figures presented by the State. It will need to determine whether to accept these new figures and decide whether it should grant a stay and reopen discovery in order to allow the class to respond to the State's presentation of these new figures.

E. *Prejudgment Interest of the Unlawful Portion of the License Fees from the Date the Class Action Was Filed*

The class seeks a refund under AS 43.10.210,[18] of all unlawfully exacted fees from the date of filing the lawsuit

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[18] AS 43.15.010 was renumbered 43.10.210. AS 43.10.210(a) provides:

> The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if

with statutory prejudgment interest calculated under AS 45.45.010. In *Carlson I* we held that AS 43.15.010 would govern any refund in this case, and that if the class succeeded on its constitutional claims it could only recover unlawfully collected fees if it could satisfy the protest requirement of AS 43.15.010. 798 P.2d at 1279-80. We remanded for further findings on whether the State had waived the protest requirement, thereby allowing a refund of all fees not barred by the statute of limitations. *Id.* The superior court found that the State had not waived the protest requirement.

The class admits that it could not have satisfied the protest requirement for the taxes paid prior to the filing of the lawsuit, and thus does not seek a refund of any unlawfully assessed fees paid prior to June 22, 1984. However, the class claims that the filing of the complaint in the case at bar fulfills the protest requirement.

Although the State does not address this issue in its brief, the record indicates that the State agrees that those fees which were paid after June 22, 1984, were paid under protest sufficient to permit a refund under AS 43.10.210. This does not mean that the State concedes that any refund would be due if the class succeeds. The State argued below that it only had conceded that the protest requirement of AS 43.10.210 had been met, and that this "is merely one precondition to the '[r]ecovery of overpayments and protested payments.' " Because the State does

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(1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax. . . .

not brief this issue, it is impossible to know whether it would still make this argument.

If on remand the superior court determines that the class has prevailed, the superior court must also decide whether the filing of this suit constituted notice sufficient to comply with the protest requirement of AS 43.10.210(a), and whether prejudgment interest is due under AS 45.45.010.

IV. *CONCLUSION*

We conclude that this appeal does not implicate the Commerce Clause. We REVERSE the superior court's approval of the State's *pro rata* formula of calculating and comparing the taxation burden placed on resident and nonresident commercial fishers, and we REMAND for application of the class's *per capita* formula. We also order that on remand the superior court address the unresolved issues concerning the appropriate budget items to be considered in determining the State's expenditures (*i.e.*, resident contributions). Additionally, if the superior court finds for the class, it must determine the date from which the class should be given a refund, and what, if any, interest is due on that refund.

APPENDIX

The following is a comparison of the two proposed formulae which uses the statistics proffered by the State for the years 1982 through 1989. It is difficult to compare the State's and class's formulae because they calculate

and compare different quantities in an attempt to measure what residents and nonresidents are paying. The class's formula calculates the fee differential which would be allowable, while the State's formula computes the respective percentages of costs of running the commercial fisheries which residents and nonresidents could pay and still be "treated similarly."

A. *Application of the Class's Per Capita Formula*

The class's *per capita* formula: Fisheries Budget/ Alaska Population x Percentage State Budget from Oil Revenues.

1982: $29,000,000 / 500,000[19] x 83% = $48.14
1983: $31,000,000 / 500,000 x 81% = $50.22
1984: $34,000,000 / 500,000 x 82% = $55.76
1985: $34,800,000 / 500,000 x 82% = $57.07
1986: $34,500,000 / 500,000 x 86% = $59.34
1987: $29,600,000 / 500,000 x 76% = $44.99
1988: $29,300,000 / 500,000 x 83% = $48.64
1989: $29,900,000 / 500,000 x 82% = $49.04

Under the *per capita* formula the allowable fee differential will vary from year to year. For example, in 1982 the difference between a resident and nonresident permit could not substantially exceed $48.14, while in 1986 the difference could not substantially exceed $59.34.

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[19] For the purpose of this example we will assume that the population of Alaska is 500,000.

B. *Application of the State's Pro Rata Formula*

The State's formula calls for the comparison of two calculations: (1) Fair Share of Resident Costs = (Residents' Pro Rata Share[20]) x (Fisheries Budget x Percentage of State Revenue from Oil); and (2) Fair Share Nonresident Costs = (Nonresidents' Pro Rata Share[21]) x (Fisheries Budget x Percentage of State Revenue from Oil).

The following two tables are the application of these formulae.

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[20] Residents' Pro Rata Share: (Percentage of Permits Held by Residents) x (Fisheries Budget).

[21] Nonresidents' Pro Rata Share: (Percentage of Permits Held by Nonresidents) x (Fisheries Budget).

Percentage of State's Commercial Fishery Expenditures Paid By Residents:

Fiscal Year	*Column 1 % of Limited Entry Permits Held By Residents*	*Column 2 Total Expenditures By Four Agencies For Commercial Fishery Management*	*Column 3 Residents' Pro Rata Share of Total Expenditures*	*Column 4 % of the Total State Revenues To Which Nonresidents Make No Contribution*	*Column 5 Residents' Pro Rata Share of Expenditures From Revenues To Which Nonresidents Make No Contribution*	*Column 6 Residents' Fees Paid For Licenses and Permits*	*Column 7 Total Amount Paid By Residents To Participate in Commercial Fisheries*	*Column 8 % Paid By Residents of Their Pro Rata Share of State Expenditures For Commercial Fisheries*
1982	*83%*	*$29.0*	*$24.1*	*83%*	*$20*	*1.3*	*$21.3*	*88%*
1983	*84%*	*$31.0*	*$26.0*	*81%*	*$21.1*	*1.3*	*$22.4*	*86%*
1984	*85%*	*$34.0*	*$28.9*	*82%*	*$23.7*	*1.2*	*$24.9*	*86%*
1985	*84%*	*$34.8*	*$29.2*	*82%*	*$23.9*	*1.5*	*$25.4*	*87%*
1986	*84%*	*$34.5*	*$29.0*	*86%*	*$24.9*	*1.5*	*$26.4*	*91%*
1987	*82%*	*$29.6*	*$24.3*	*76%*	*$18.5*	*1.7*	*$20.2*	*83%*
1988	*82%*	*$29.3*	*$24.0*	*83%*	*$19.9*	*2.0*	*$21.9*	*91%*
1989	*82%*	*$29.9*	*$24.5*	*82%*	*$20.1*	*2.0*	*$22.1*	*90%*

Percentage of State's Commercial Fishery Expenditures Paid By Nonresidents:

Year	*Column 1* *% of Limited Entry Permits Held By Nonresidents*	*Column 2* *Total Expenditures By Four Agencies For Commercial Fishery Management*	*Column 3* *Nonresidents' Pro Rata Share of Total Expenditures*	*Column 4* *Nonresidents' Fees Paid For Licenses and Permits*	*Column 5* *% Paid By Nonresidents of Their Pro Rata Share of State Expenditures For Commercial Fisheries*
1982	*17%*	*$29.0*	*$4.9*	*$1.3*	*27%*
1983	*16%*	*$31.0*	*$5.0*	*$1.2*	*24%*
1984	*15%*	*$34.0*	*$5.1*	*$1.0*	*20%*
1985	*16%*	*$34.8*	*$5.6*	*$1.2*	*21%*
1936	*16%*	*$34.5*	*$5.5*	*$1.3*	*24%*
1987	*18%*	*$29.6*	*$5.3*	*$1.6*	*30%*
1988	*18%*	*$29.3*	*$5.3*	*$2.3*	*43%*
1989	*18%*	*$29.9*	*$5.4*	*$2.2*	*41%*

Under the *pro rata* formula the differential is constitutional as long as the percentage of fair costs nonresidents are paying does not exceed the percentage of fair costs that residents are paying. Thus, the fee differential was constitutional in 1983 because residents paid 86% of their share and nonresidents only paid 24% of their share. As stated in the text of the opinion, the flaw with this formula is that it treats the resident fishers as if they alone are paying the tax equivalent (percentage of revenues to which nonresidents make no contribution). For this formula to accurately calculate the resident fishers' contribution, it would need to divide the residents' *pro rata* fair share by the population of Alaska and then multiply by the number of resident fishers.

RABINOWITZ, Justice, dissenting.

The majority concludes that since *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), was decided under the Commerce Clause as opposed to the Privileges and Immunities Clause, its reasoning is inapposite here. I cannot agree.

The United States Supreme Court has long acknowledged "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause – a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism. . . ." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32, 98 S.Ct. 2482, 2490, 57 L.Ed.2d 397 (1978). It has, in fact, endorsed the methodology of referring to Commerce Clause precedent in

deciding claims based solely on the Privileges and Immunities Clause. *Id. See also Sestric v. Clark*, 765 F.2d 655, 664 (7th Cir.1985) ("The two clauses are part of the same document, drafted by very intelligent and careful men; why would they have wanted the same discrimination against nonresidents to be tested by a different standard, depending on which clause was cited in the complaint?").

I do not mean to suggest that the two clauses are completely interchangeable. The differences between them, however, appear to primarily involve matters of scope as opposed to content. For example, the market regulator – market participant doctrine can shield a state from Commerce Clause attack but not from a claim based on the Privileges and Immunities Clause. *United Bldg. & Constr. Trades Council v. Mayor*, 465 U.S. 208, 221-22, 104 S.Ct. 1020, 1029, 79 L.Ed.2d 249 (1984). On the other side of the equation, the Commerce Clause protects corporations, while the Privileges and Immunities Clause does not. *Paul v. Virginia*, 75 U.S. (8 Wall) 168, 19 L.Ed. 357 (1869).

In this way discrimination predicated somehow on state affiliation can fall within the scope of the Privileges and Immunities Clause alone, the Commerce Clause alone, both clauses, or, for that matter, neither.[1] Once it

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[1] A well-recognized example of this last category would be a policy of discriminating against nonresidents in the granting of recreational game or fishing license fees. This kind of state discrimination does not implicate the Commerce Clause since it does not significantly burden interstate commerce, and it does not implicate the Privileges and Immunities Clause because it does not involve a fundamental right. *See, e.g.*,

has been determined that a discriminatory policy falls within the purview of one or both of these clauses, however, I am not persuaded that the methodology of the two should diverge in any significant respect. The extent to which the interpretation of these two clauses has historically been interwoven confirms this assessment.

Further, the level of scrutiny triggered by a discriminatory policy that falls within the scope of either of these clauses appears to be very nearly identical. Professor Tribe has observed that the standard of review employed in Privileges and Immunities cases is "almost as demanding as that elaborated by the Warren Court in equal protection and first amendment strict scrutiny."[2] Similarly, in *Oregon Waste Systems*, the Supreme Court observed that Commerce Clause cases "require that justifications for discriminatory restrictions on commerce pass the 'strictest scrutiny.' " *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1351. Under both clauses, the burden is placed on the state to provide a sufficient justification for its discriminatory policy.

Considering the significant similarities between the two clauses, it not surprising that in *Carlson I* we simply referenced our Privileges and Immunities Clause analysis in order to dispose of the Commerce Clause issue, concluding that "[t]he analysis under Article I, section 8, clause 3 of the United States Constitution (the Commerce Clause) is quite similar, assuming that it is implicated."

Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978).

[2] Lawrence H. Tribe, *American Constitutional Law* § 6-35, at 544 (2d ed.1988).

Carlson I, 798 P.2d at 1276. Indeed, we went on to state that "[i]t would be anomalous . . . to conclude that a law facially discriminating against interstate commerce could pass muster under the Privilege and Immunities Clause yet fail under the Commerce Clause; both clauses have a common origin in the fourth article of the Articles of Confederation." *Id.* at 1277 n. 5. In the wake of the United States Supreme Court's ruling in *Oregon Waste Systems*, however, the majority has reconsidered this position and concluded that, in fact, "the analysis is not interchangeable."

It is obvious that the fee discrepancy in this case implicates the Privileges and Immunities Clause. The policy is facially discriminatory, and it impairs an interest that is "fundamental" for purposes of Privileges and Immunities Clause analysis. Given the exceptionally close relationship between this clause and the Commerce Clause, I cannot, as noted above, join in the majority's summary rejection of the United States Supreme Court's reasoning in *Oregon Waste Systems*.

The justification offered by Oregon for discriminating against out-of-state interests in *Oregon Waste Systems* is very similar, if not identical, to the justification advanced by the State in the case at bar. The primary rationale is that out-of-state interests ought to be made to bear their "fair share" of the costs that their activities impose on the state. *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1351; *Carlson I*, 798 P.2d at 1272. In both cases, the "share"

or contribution of in-state interests is augmented by general state tax revenues, or their analytical equivalent, in order to justify the tax or fee discrepancies.[3]

In *Carlson I*, we concluded that this kind of augmentation was acceptable under the holding of *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). In *Toomer*, the Supreme Court stated, in dicta, that a state could "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." *Id.* at 399, 68 S.Ct. at 1163. The Supreme Court in *Oregon Waste Systems*, however, expressing its reluctance to "plunge . . . into the morass of weighing comparative tax burdens by comparing taxes on dissimilar events[,]" explicitly rejected this type of justification for state discrimination in the Commerce Clause context. *Oregon Waste Systems*,

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[3] Although the majority asserts that the fee-shifting we authorized in *Carlson I* is not the same kind of fee-shifting denounced by the Supreme Court in *Oregon Waste Systems*, I think that the similarities between the two far outweigh any potential differences. The approach authorized by the majority seems to place greater emphasis on the theoretical equality of individual contributions than the Oregon tax did. There is, however, no indication that the Oregon tax was designed to impose on out-of-state interests their "entire share" of solid waste disposal costs nor, for that matter, that the shares of disposers of in-state waste, who paid an $0.85 per ton fee, were to be borne by the entire population. More importantly, the decision in *Oregon Waste Systems* did not turn on the fact that the surcharge was excessive but rather on the conclusion that any surcharge was constitutionally offensive under the circumstances. Consequently, the majority's endorsement of the class's *per capita* approach does not sufficiently distinguish the fee discrepancies here from those in *Oregon Waste Systems*.

511 U.S. at ___, 114 S.Ct. at 1353 (citations and internal quotation marks omitted).

The majority correctly observes that the compensatory tax doctrine, focusing on whether or not the taxes which allegedly cancel each other out are imposed on "substantially equivalent events," finds its origins in Commerce Clause cases. It does not follow from this observation, however, that the doctrine has no place in Privileges and Immunities analysis. There is nothing inherent in this doctrine, or the policy concerns behind it, that indicates that it should only apply to discriminatory state taxation challenged under the Commerce Clause.

In *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), the Supreme Court struck down a discriminatory tax on the grounds that "manufacturing and wholesaling are not 'substantially equivalent events' " on which compensating taxes might be imposed. *Id.* at 643, 104 S.Ct. at 2623. In that case, West Virginia had imposed a wholesale gross receipts tax from which local manufacturers were exempt. The policy underlying the exemption was that it would put in-state manufacturers who were wholesaling their products in West Virginia on equal footing with their out-of-state competitors who were functionally exempt from West Virginia's manufacturing tax.[4] The Court rejected this justification, observing that

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[4] Presumably the only reason that the Privileges and Immunities Clause was not invoked in this case – where it would seem to be a natural choice – is that the plaintiff was a corporation not entitled to protection under that clause. As such, the *Armco* case provides an excellent example of how the

> [i]f Ohio or any of the other 48 States imposes a like tax on its manufacturers – which they have every right to do – then Armco and others from out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax.

Id. at 644, 104 S.Ct. at 2623.

Likewise, the Supreme Court in *Oregon Waste Systems* observed that Oregon's compensatory tax theory "ignore[s] the fact that shippers of waste from other States in all likelihood pay income taxes in other States, a portion of which might well be used to pay for waste reduction activities in those States." *Oregon Waste Systems*, 511 U.S. at ___ n. 7, 114 S.Ct. at 1353 n. 7.

In this respect the "substantially equivalent events" test essentially serves to identify a significant logical flaw that often infects "fair share" justifications for discriminatory taxes. I can see no reason to assume that this flaw is any less serious when it is exposed through litigation based upon the Privileges and Immunities Clause than it is when challenged under the Commerce Clause.[5]

"substantially equivalent events" test should apply with equal force regardless of which clause is invoked.

[5] A commentator has observed:

> While differences exist between the purposes and functions of the two constitutional clauses, they clearly exert overlapping spheres of influence. To hold the same tax invalid under one clause because it does not meet the substantially equivalent events requirement of the compensatory tax test, but valid under the other clause because it is important . . . that

The justification advanced by the State in this case suffers from precisely the same defect alluded to in both *Armco* and *Oregon Waste Systems*. Specifically, a fisher from Oregon who purchases a commercial license in Alaska will no doubt be under an obligation to pay Oregon income taxes, a portion of which probably will have been used for conservation costs in that state. Accordingly, the fee discrepancy places the Oregon fisher, as a nonresident, at a competitive disadvantage. In other words, both the Alaska fisher and the Oregon fisher are obliged to contribute to a general tax fund[6] from which their respective States may draw monies to support local fisheries, but only the Oregon fisher is being called upon to pay enhanced fees.

Restating our holding in *Carlson I*, the majority concludes that "[t]he disparate fees charged to nonresidents will not offend the Privileges and Immunities Clause if the differential does not exceed the contribution made by residents, because the differential will be justified as imposing on nonresidents their share of the costs of commercial fisheries." Implicit in this analysis is that a share

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> a state have power to preserve and regulate the exploitation of an important resource through means of a functionally compensatory tax, is surely to elevate form over substance.

Jeffrey J. Lamontagne, Note, *Oregon's Wasted Effort: The Supreme Court's Inability to Adapt its Compensatory Tax Doctrine to Solid Waste Regulations*, 19 Wm. & Mary Envtl. L. & Pol'y Rev. 345, 360 (1995) (citations and internal quotation marks omitted).

[6] The Alaskan fisher "contributes" in the form of foregone benefits from petroleum revenues.

of this state's petroleum revenues, the analytical equivalent to general tax revenues, should be attributed to the resident fishers in calculating their contribution. Since I believe that the United States Supreme Court's holding in *Oregon Waste Systems* effectively forecloses this method of justifying a discriminatory tax, I cannot agree.

On the basis of the Supreme Court's reasoning in *Oregon Waste Systems,* I conclude that the fee discrepancies authorized by AS 16.05.480, AS 16.43.160 and 20 AAC 05.240 violate the Privileges and Immunities Clause of the Constitution of the United States of America.